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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1003

NATHAN M. LUBAR, Trustee for District Finance Corporation, *Petitioner*,

v.

HARRY HARTMAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the District of Columbia.

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HARRY HARTMAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the District of Columbia.

Nathan M. Lubar, Trustee for District Finance Corporation, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause, Number 7965, on December 31, 1942, petition for rehearing denied February 17, 1943, reversing the Municipal Court for the District of Columbia.

OPINION BELOW.

The opinion below was handed down on December 31, 1942, and is reported in 133 F. (2d) 44. (R. p. 47.)

JURISDICTION.

The judgment of the Court of Appeals was entered on December 31, 1942 (R. 47), petition for rehearing denied February 17, 1943 (R. 65). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Acts of February 13, 1925, Jan. 31, 1928, June 7, 1934, 28 U. S. C. A. 347. Also 28 U. S. C. A. 377. This petition was filed within 90 days from the date of the order denying rehearing.

STATUTES INVOLVED.

The pertinent sections of the Act of Congress of February 4, 1913, 37 Stat. 657, amended March 3, 1917, 39 Stat. 1006, D. C. Code (1924) pp. 572 ff, ch. 26, Secs. 1 to 11, (Title 26, Secs. 601-611, 1940 D. C. Code), hereinafter referred to as the Small Loan Act, are as follows:

> 26-601. "It shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring a license * * *."
>
> 26-605. "No such person * * * shall charge or receive a greater rate of interest * * * than one per centum per month * * *. No such loan greater than two hundred dollars shall be made to any one person; provided, that any person contracting, directly or indirectly, for, or receiving a greater rate of interest than that fixed in this chapter, shall forfeit all interest so contracted for or received; and in addition thereto shall forfeit to the borrower a sum of money, to be deducted from the amount due for principal, equal to one-fourth of the principal sum * * *."
>
> 26-607. "Any violation of this chapter shall be punished by a fine of not less than twenty-five dollars, and not greater than two hundred dollars, or by imprisonment * * * for not less than five nor more than thirty days, or by both * * *."
>
> 26-610. "Nothing contained in this chapter shall be held to apply to the legitimate business of national

banks, licensed bankers, trust companies, savings banks, building and loan associations, or real estate brokers, as defined in sections 47-1701 to 47-1709, (Act of July 1, 1902, 32 Stat. 621)."

The pertinent sections of the Act of Congress of March 3, 1901, 31 Stat. 1377, ch. 854, Sec. 1178-1186; June 30, 1902, 32 Stat. 542 ch. 1329; April 19, 1920, 41 Stat. 568, ch. 153; stated in Title 28 D. C. Code, 1940, Secs. 2701 to 2709, hereinafter referred to as the Interest and Usury Law:

28-2702. "The parties to a * * * promissory note, or other instrument of writing * * * may contract therein for the payment of interest on the principal amount thereof at any rate not exceeding eight per centum per annum."

28-2703. "If any person or corporation shall contract in the District, verbally, to pay a greater rate of interest than six per centum per annum, or shall contract, in writing, to pay a greater rate than eight per centum per annum, the creditor shall forfeit the whole of the interest so contracted to be received; Provided, that nothing in this chapter contained shall be held to repeal or affect sections 26-601 to 26-611."[1]

QUESTIONS PRESENTED.

1. Is the Act a Small Loan Act limited to loans of two hundred dollars or less, or does it apply to any loan of any size by one in the business of loaning money.

2. Is the action of the lower Court in setting aside the specific penalty prescribed in the Act and substituting a new one, a deprivation of due process; or judicial legislation, contrary to the Constitution.

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[1] Legislative History. April 22, 1870, R. S. D. C. 715; March 2, 1889, 25th Stat. L. p. 1006, Ch. 413; June 30, 1902 (32 Stat. Pt. 1, 542); Feb. 4, 1913, 37 Stat. 657, D. C. Code 1924, pp. 572 ff; (replacing Pawnbroker's Act—Newman v. U. S., 41 App. D. C. 37, 47); April 19, 1920, 41 Stat. L. 568, Ch. 153, Sec. 1180, D. C. Code, 1924 (T. 28, Sec. 2703, 1940 D. C. Code).

3. Can the Act be sustained as a police regulation in view of the decision of the lower Court removing the limitations which the same Court had stated in former decisions upheld the regulation as a reasonable exercise of that power.

GROUNDS FOR APPLYING FOR THE WRIT.

1. It is a matter of public importance that the Act which has been erroneously and unreasonably construed by the Court of Appeals below should be properly and reasonably construed, so that the numerous investments made by petitioner's *cestui que trust* and others in the District of Columbia in reliance upon the consistent interpretation of the Act, since its enactment in 1913, should not be swept aside by the voiding of notes and trusts upon real and personal property.[1] The Interest and Usury Act makes legal a rate of eight per cent but the instant decision makes such illegal, voids all contracts made thereunder and specifically nullifies both Acts of Congress.

2. The decision of the lower Court is directly in conflict with the decisions of this Court: by ignoring the specific penalty prescribed by the Act and imposing an arbitrary penalty:

McBroom v. *Scottish Mortgage & Land Investment Co.*, 153 U. S. 318, 328
Fritts v. Palmer, 132 U. S. 282, 291
Carter v. *Carusi*, 112 U. S. 478
Bank v. *Whitney*, 103 U. S. 99, 103
Oates v. *Bank*, 100 U. S. 239, 249

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[1] *Helvering* v. *Griffiths*, 63 S. Ct. 636, 653, decided Mar. 1, 1943: "To rip out of the past seven years of tax administration a principle of law on which both government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety. We have recently held as to another questioned decision of this Court that a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." *Davis* v. *Dept. of Labor*, 317 U. S. ——; 63 S. Ct. 225, 87 L. Ed. ——, decided Dec. 14, 1942. We think this another example of the same principle."

Bank v. *Matthews*, 98 U. S. 621, 627
Bank v. *Dearing*, 91 U. S. 29, 35
Smith v. *Sheeley*, 12 Wall. 358, 361
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And is in conflict with the prior decisions of the lower Court:

Von Rosen v. *Dean*, 59 App. D. C. 359; 41 Fed. (2d) 982
Chew v. *D. C.*, 42 App. D. C. 410
Newman v. *U. S. ex rel Prender*, 41 App. D. C. 37
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Brown v. *Slocum*, 30 App. D. C. 576, 580
Cf. Horning v. *D. C.*, 48 App. D. C. 380, Affirmed 254 U. S. 135, 41 S. Ct. 53.

3. Petitioner is denied the equal protection of the law by being excluded from loaning sums over $200.00 (the limit in the Act) while banks, trust companies, building and loan associations and real estate brokers are given such exclusive privilege.

Yick Wo v. *Hopkins*, 118 U. S. 356, 369
Missouri v. *Lewis*, 101 U. S. 22, 31

The decision of the court below has removed the basis upon which it had previously declared the Act constitutional and has by implication declared it unconstitutional; it is therefore a matter of great importance that the Act should be properly and reasonably construed so that the confusion that now exists in the District of Columbia as to the validity of the Act should be clarified. The Statute is based upon the police powers, but this decision removes the basis for the same as previously decided in the same Court.

Newman v. *U. S. ex rel Prender, supra.*
Reagan v. *D. C., supra*

4. The decision of the court below constitutes judicial legislation in violation of Art. 1, Sec. 1, of the Constitution in that it ignores the specific penalty set by Congress and has opened the door to the imposition of an arbitrary penalty which it may choose to inflict.

STATEMENT.

The case involves an action in *replevin* (R. 1) for the possession of personal chattels by the petitioner as trustee under a chattel deed of trust (R. 43, Ex. 2) upon default of an obligation in the amount of $1,000.00 (R. 30, Ex. 3) against two defendants, constituting a partnership. (R. 32, Ex. 4.) One of the defendants confessed judgment. (R. 12, lines 1-6.) The other defendant entered a plea of "not guilty". (R. 2.) A trial was had and a finding was entered against both defendants with an opinion of the Court that the defense of usury was not supported by the evidence. (R. 7.) A new trial was granted (R. 9) because counsel and the Court were unable to agree upon a Bill of Exceptions. (R. 9.) Upon a re-trial of the case, a directed verdict for the plaintiff was ordered by the Trial Court for possession of the chattels, based upon the opening statement of counsel for defendant (R. 14-15) that the sole defense was that the chattel trust was void and the trustee had no title because excessive interest was charged (R. 13, 18, 20). One of the defendants, respondent herein, applied to the Court of Appeals for a writ of error to the Municipal Court, which was granted. See statement of points there relied upon. (R. 39.)

Upon consideration of the case, the Court in its decision stated (R. 47): "We took the case to determine whether it is controlled by the Act of February 4, 1913, * * *." The Court held that the Act applied to the instant transaction but refused to apply the penalty provided in the Act[1] (R.

[1] "* * * No such loan greater than two hundred dollars shall be made to any one person: provided, that any person contracting, directly or indirectly, for, or receiving a greater rate of interest than that fixed in this chapter, shall forfeit all interest so contracted for or received; and in addition thereto shall forfeit to the

50) and substituted a greater and different penalty contrary to decisions of the Court since the enactment of the Act, by declaring that the entire principal is uncollectable and the note and security null and void.

A petition for rehearing was filed by petitioner setting forth that the Court had by its decision reversed, without referring to or considering, the *Reagan* and *Newman* cases, *supra*, which in 1913 and 1914 had upheld the constitutionality of the Act under the police power by limiting the application of the Act to the class of persons and the evil sought to be controlled by Congress; that the Court by its decision included all persons, and eliminated the basis under which the Act had been held constitutional. The petition for rehearing was summarily denied without oral argument.

REASONS FOR GRANTING THE WRIT.

I.

It is important that this Court determine whether the Small Loan Act is limited to transactions of $200.00 or less or applies to transactions of unlimited amounts by persons engaged in the business of lending money.[1] For if the ap-

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borrower a sum of money, to be deducted from the amount due for principal equal to one-fourth of the principal sum." Title 26-605, 1940 D. C. Code.

"If any person * * * shall contract, in writing, to pay a greater rate than eight per centum per annum, the creditor shall forfeit the whole of the interest so contracted to be received. * * *." Title 28-2703, 1940 D. C. Code.

[1] The intention of Congress when the proposed Small Loan Act was enacted, is shown clearly to have been limited to "small loans" in the amount prescribed by the Act, and other congressional hearings and discussions at the time of the introduction of the Act (May 5, 1911) and passage thereof. Statements in the Congressional Record, indicated the limitation of $200.00 was considered as the maximum small loan under consideration and in the debates in Congress, this act was consistently referred to as the "Small Loan Act." Specific cases were discussed, indicating this intention as shown by examples used of loans ranging from $35.00 to $204.00 and the hardships resulting from the same. H. R. 8768, Congressional Record, Vol. 49, 62nd Congress, Third Session, pp. 1022, 3533, 3705, 3708, 1255-6; 1929-30. Also, Act

plication of the Act is extended to loans of any amount then this Court must determine whether the Act so construed is a valid exercise of the police power.

It is respectfully called to the attention of the Court, in all of the states of the United States where the question of constitutionality has been raised as to Small Loan Acts, such statutes have been upheld under the regulatory powers of the legislatures by reason of the strict classification of Small Loan Acts to small loans, and for the particular purpose of protecting the class of persons affected.[2]

In the case of *Reagan* v. *D. C., supra,* p. 413, the Court said:

> "The constitutionality of the act is assailed upon the ground that it discriminates in favor or 'National banks, licensed bankers, trust companies, savings banks, building and loan associations, or real-estate brokers.' The act, as above suggested, is not intended to regulate the rate of interest to be charged generally in the legitimate business of loaning money in this District, but to regulate interest rates in the loaning of small sums of money, which had heretofore been conducted in such a manner as to impose grievous burdens upon a class of persons least able to bear them. The wrong to be remedied is such as to bring the subject within the exercise of the police power of Congress."

The decision of the Court in the instant case holds that it is illegal to engage in the business of lending money at the rate of more than six percent and all contracts made, regardless of amount, in excess of six percent, shall be void. National banks, licensed bankers, trust companies, savings

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of Sept. 17, 1890, 51st Congress, First Session, U. S. House Reports, Vol. 10, p. 3103, wherein pawnbrokers act was discussed and its application in the same manner as present small loan act was considered. *Reagan* v. *D. C.*, 41 App. D. C. 409—Writ of Error denied—U. S. Supreme Court, 1914. See Report of Committee on Judiciary, H. R. 14974; 64th Congress, First Session, May 15, 1916—Serial 47 (Library Congress—Class Law Book—D. C. 2).

[2] See Personal Finance Laws by Renah F. Camalier (1938 Edition).

banks, building and loan associations or real-estate brokers are exempt from the application of this statute. The decision, therefore, as determining the intent of Congress, contrary to the decisions in the *Reagan* and *Von Rosen* cases, *supra*, denies the equal protection of the law and creates class legislation in violation of the constitutional prohibition.

Griffith v. *Conn*, 218 U. S. 563[1]
Liggett Co. v. *Baldridge*, 278 U. S. 105 (1928)
Smith v. *Cahoon, Sheriff*, 283 U. S. 553 (1931)
Power Mfg. Co. v. *Saunders*, 274 U. S. 490 (1927)[2]
See *People* v. *Stokes*, 281 Ill. 159[3]

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[1] In the Griffith case, the classification involved was upheld on the ground that the businesses of those exempted thereunder were closely supervised and regulated by specific state laws. The same businesses are exempt under the Act here (R. 50), but there is no provision of law in the District of Columbia for their supervision or regulation; it is true that the Act directs attention to Sec. 47-1701 et seq., but those sections merely fix the rate of tax which may be imposed upon them.

[2] Page 493: "The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (*Truax* v. *Corrigan*, 257 U. S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254; 27 A. L. R. 375; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56, 59, 35 S. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953), and extends as well to corporate as to natural persons (*Smyth* v. *Ames*, 169 U. S. 466, 522, 18 S. Ct. 418, 42 L. Ed. 819; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 154, 17 S. Ct. 255, 41 L. Ed. 666; *Santa Clara County* v. *Southern Pacific R. R. Co.*, 118 U. S. 394, 396, 6 S. Ct. 1132, 30 L. Ed. 118. It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. *Truax* v. *Corrigan*, *supra*, page 337 (42 S. Ct. 131); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, *Supra*, 155 (17 S. Ct. 256); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Ft. Smith Light & Power Co.* v. *Board of Improvement* (May 16, 1927) 274 U. S. 387, 47 S. Ct. 595, 71 L. Ed. 1112."

[3] (p. 168) "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great

II.

The fact that the Court below has set aside specific penalties imposed by the two Acts[1] calls for the exercise of this Court's power to review to determine whether the substitution of a new penalty is a deprivation of due process under the Constitution.

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and the small, but in this case size is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect. See *Muscow* v. *U. S. Surety Co.*, 196 N. Y. 456, 465; *McLean* v. *Arkansas*, 211 U. S. 539; 53 L. Ed. 315, 29 S. Ct. 206."

(p. 170) "That evils exist with respect to small loans, which are not common to other loans was well pointed out in *State* v. *Sherman*, 18 Wyo. 169. In that case the Statute of Wyoming made it unlawful for any person * * * to receive or contract for any greater interest than 25% upon any loan less than $200. The Court, after reviewing the leading cases on the subject, sustained the validity of such classification, and said: 'It is a matter of common knowledge, upon which the legislature is presumed to have acted, that * * * the taking of interest much in excess of the rate allowed by law was customarily practiced by those engaged in the business of making small loans, usually under such circumstances to persons of small means, who by reason of their actual or supposed necessities are compelled to deal with and yield to the demands of those engaged in that business. And it may be the fact that the practice of exacting such oppressive rates of interest is very largely, if not entirely, confined to the class of persons and transactions referred to. There would thus appear to be a substantial difference between that class and others with respect to the rate of interest demanded and received. The act fixes the dividing line between the class affected by it and the persons and transactions excluded, at the sum of $200. * * * A person requiring the loan of a larger sum would be * * * in a position of greater freedom in the matter of agreement as to the rate of interest as well as in the selection of the person with whom to arrange for the loan. * * * In our opinion therefore the act is not unconstitutional on the ground of arbitrary or unreasonable classification.' (See *Massie* v. *Cessna*, 239 Ill. 352, where statute declaring wage assignment void, without classification, was held unconstitutional)."

(p. 174) "The object of the law is not to regulate the rate of interest, but, on the contrary, is to regulate the business of making loans of small sums of money to wage earners and salaried people."

[1] See D. C. Code, 1940 T. 26, Secs. 605, 607; T. 28, Sec. 2703.

The decision in this case is of great and widespread importance to business and persons generally for by its context it declares that any contract wherein a rate of interest in excess of six per centum is charged by any person or firm in the business of loaning money other than those excepted under the Act, regardless of the amount loaned, results in the complete loss of the entire principal amount of the loan in addition to such interest which may have been charged.[1]

This is in direct conflict with the holding of this Court in *Carter* v. *Carusi*, 112 U. S. 478.

Harris v. *Runnel*, 12 Howard 79, 84:

> "Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. * * * it does not follow that the unlawfulness of the Act was meant by the legislature to avoid a contract made in contravention of it. * * * Statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before Courts should refuse to give aid to enforce contracts which are said to be in contravention of them. * * * The subject matter and the sufficiency of the pen-

[1] The Municipal Court of Appeals for the District of Columbia relied upon the prior decisions of the U. S. Court of Appeals D. C., in *Knott* v. *Jackson*, Nos. 7 and 8 Mun. Ct. App. D. C., 71, W. L. R. 6, decided Dec. 16, 1942, the Court said: "* * * The cross-appeal is based upon the refusal of the trial court to rule that the case came within the provisions of the so-called Loan Shark Law (D. C. Code 1940 T. 26, Secs. 601-611, which provides that the person violating the provisions of the act shall forfeit all interest, and in addition thereto shall forfeit a sum equal to one-fourth of the principal sum. The Loan Shark Law is not a usury statute, but an act, licensing, under limitations and restrictions, the lending of money in small sums upon personal security (*Reagan* v. *D. C.*, 41 App. D. C. 409, 412); and was intended to apply only to persons making small loans upon personal security as shown by the fact that the amount of the said loans is limited by the act to $200.00. (*Von Rosen* v. *Dean*, 59 App. D. C. 359, 360.) The actual amount loaned in this case, nearly $700.00, can hardly be called a small loan and is far above the figure fixed by the act."

> alty * * * to prevent the mischief against which the legislature meant to guard, imply that the legislature did not mean that such a contract should not be enforced in a court of justice. * * * Our judgment in this case is, that the contract is not void, * * *.'"[1]

See cases cited under Grounds For Applying For the Writ this petition. (item 2)

The intentions of Congress as to the penalties prescribed for violation of both the Usury and Small Loan Statutes should be carefully considered in view of the drastic effect upon business generally and the established customs and practices based upon judicial interpretations and the general reliance of the members of the Bar in advising clients based on these judicial interpretations. See *Helvering* v. *Griffiths, supra.*

The interpration of the "Small Loan Act" as announced by the Court in this decision removes the safeguards of the "equal protection" and the "due process" clauses of the Constitution, and removes the stamp of constitutional validity placed on the Act by its prior decisions.

The contract involved herein should not be declared void, and it therefore follows that the security is valid, and title to the property involved is legally in the petitioner.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

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[1] Contra-Decision of Court below (R. 48).